DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Student Hearing Office
810 First Street, NE, Second Floor
Washington, DC 20002

OSSE STUDENT HEARING OFFICE
2012 SEP 20 AM 9:04

on behalf of

Petitioner,

Hearing Officer: Kimm Massey, Esq.

v

Case No: 2012-0511

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,

Respondent.

HEARING OFFICER DETERMINATION

BACKGROUND AND PROCEDURAL HISTORY

Student is a -year old female, who most recently attended a DCPS Charter School. On July 25, 2012, Petitioner filed a Complaint against DCPS, alleging that (1) DCPS failed to provide Student with an IEP that was reasonably calculated to provide educational benefit for school year ("SY") 2010/11 and 2011/12; (2) failed to provide Student with an appropriate school placement for SY 2011/12 and with any placement since May 9, 2012, and (3) failed to provide Student with disciplinary protections afforded disabled student by IDEA, including manifestation determination hearings, adjustments to the IEP, and /or an alternative education setting. As relief for these alleged denials of FAPE, Petitioner requested immediate placement and funding at a full-time therapeutic special education day school placement with behavioral and emotional support, such as or an Order requiring DCPS to revise Student's IEP to include full-time appropriate special education and related services, and to complete an FBA and develop a BIP for Student; and an award of compensatory education in the form of academic tutoring and social skills therapy.

Also on July 25, 2012, Petitioner filed a Motion for Expedited Hearing, asserting that an expedited hearing was necessary in light of DCPS's failure to comply with the applicable disciplinary procedures. The hearing officer granted the Motion for an Expedited Hearing on by written Order issued on August 2, 2012.

On August 9, 2012, DCPS filed its Response, which asserted the statute of limitations for claims based upon issues and facts prior to April 2010. The Response further assert that all IEPs

proposed for Student have been reasonably calculated to provide meaningful educational benefit, and the placement hours have been chosen to provide Student the LRE for implementation of the goals; that Petitioner failed to identify the IEP and components thereof of which it complains, which renders the DPC insufficient; that Petitioner's counsel is confused about site versus placement, because Parent chose the site, which is a public charter school, by application, and DCPS as the special education LEA has no control over the admission or dismissal of students from the PCS, but in any event, the placement as determined by the IEP has been appropriate and the LRE for Student; that Student has not been expelled from the PCS and a manifestation determination review ("MDR") was scheduled for 3 pm on August 10, 2012; and finally, that DCPS has provided FAPE and the relief requested is not warranted.

The parties concluded the Resolution Meeting process by participating in a resolution session on August 2, 2012. No agreement was reached, but the parties agreed not to shorten the 30-day resolution period. The HOD deadline is September 19, 2012, which is 10 school days after the two-day due process hearing for this case.

On August 10, 2012, the hearing officer convened a prehearing conference and led the parties through a discussion of the issues, relief requested, and other relevant topics. The hearing officer issued a Prehearing Order on August 10, 2012.

By their respective letters dated August 27, 2012, Petitioner disclosed sixty documents (Petitioner's Exhibits 1-60), and DCPS disclosed five documents (Respondent's Exhibits 1 – 5).

The two-day process hearing was held on September 4 and 5, 2012.[1] As an initial matter, both parties' exhibits were admitted without objection. Thereafter, the hearing officer received opening statements and Petitioner's testimonial evidence. At the close of Petitioner's case, DCPS made a motion for a directed verdict. After carefully considering the parties' arguments and highlighted evidence for and against the motion, the hearing officer denied DCPS's motion for a directed verdict. Thereafter, at the request of DCPS, the hearing officer adjourned for the day. On the second day of the scheduled hearing, the hearing officer received DCPS's testimonial evidence and both parties' closing statements. The hearing officer then brought the hearing to a close.

The due process hearing was convened and this Hearing Officer Determination is written pursuant to the Individuals with Disabilities Education Improvement Act ("IDEA"), 20 U.S.C. §§ 1400 et seq., the implementing regulations for IDEIA, 34 C.F.R. Part 300, and Title V, Chapter 30, of the District of Columbia Municipal Regulations ("D.C.M.R.").

ISSUE(S)

The issues to be determined are as follows:

1. Did DCPS fail to provide Student with an IEP that was reasonably calculated to provide educational benefit for school year ("SY") 2010/11 and SY 2011/12?

[1] Counsel for each party and the witnesses for each party are listed in the Appendix that accompanies this decision.

2. Did DCPS fail to provide Student with an appropriate school placement for SY 2011/12 and with any placement since May 9, 2012?

3. Did DCPS fail to provide Student with disciplinary protections afforded disabled students by IDEA, including manifestation determination hearings, adjustments to the IEP, and /or an alternative education setting?

FINDINGS OF FACT[2]

After considering all the evidence, as well as the arguments of both counsel, this Hearing Officer's Findings of Fact are as follows:

1. Student is a year old female, who attended a DCPS Charter School during SY 2011/12 but was not attending any school at the time the due process hearing in this case began.[3]

2. Student's current IEP is dated December 7, 2011. It identifies Student's primary disability as multiple disabilities and requires Student to receive 15 hours per week of specialized instruction with no related services. The IEP contains Student's present levels of educational performance ("PLOP") and sets forth annual goals in the academic areas of Mathematics, Reading, and Written Expression. In the area of emotional, social and behavioral development, the IEP states in the PLOP section that Student will continue to receive behavioral support services from a non-DCPS children's center and lists the name and number of Student's family therapist. In the needs section for that area, the IEP states that Student is receiving behavioral support services at home via the center, refuses in-school behavioral support services, and will exit services as of 12/07/10. Three annual goals are also identified, which include the goal of learning and implementing age appropriate communication skills, i.e., verbalize triggers which cause frustration. The IEP indicates that Student does not require extended year services ("ESY").[4]

3. The Notes for Student's current IEP, dated December 9, 2011, state that Student was repeating the 8th grade for the second time during SY 2011/12. At the time of the meeting Student was failing History, Science, English, and Reading Development, although she was excelling in pre-Algebra and Math Lab 8. The Notes state that Student was receiving therapy once per month outside of the Charter School and a therapist would go into the home 3 times per week to monitor Student and Parent. Parent stated that she wanted Student to receive counseling at the Charter School. The Notes indicate

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[2] To the extent that the hearing officer has declined to base a finding of fact on a witness's testimony that goes to the heart of the issue(s) under consideration, or has chosen to base a finding of fact on the testimony of one witness when another witness gave contradictory testimony on the same issue, then the hearing officer has taken such action based on the hearing officer's determinations of the credibility and/or lack of credibility of the witness(es) involved.
[3] *See* Complaint; testimony of Parent.
[4] Petitioner's Exhibit 42; Respondent's Exhibit 1.

that Student had refused such counseling in the past but would benefit from the services. Parent agreed with the draft IEP after it was reviewed with her.[5]

4. Student's previous IEP is dated December 7, 2010. It also identifies Student's primary disability as Multiple Disabilities and requires Student to receive 15 hours per week of specialized instruction with no related services. Although the IEP contains different information in the PLOP sections for Mathematics, Reading and Written Expression and the annual goal section in Mathematics contains different information than the current IEP, the goals in the areas of Reading and Written Expression are exactly the same as in the current IEP, and all of the information in the section for emotional, social and behavioral development is exactly the same as the information in the current IEP. Moreover, this IEP also indicates that Student does not require ESY services.[6]

5. Student has an extensive psychiatric history. She previously has been hospitalized on at least 8 occasions for being a danger to herself and/or others, suicidal/homicidal ideations, aggressive behaviors, and stabilization of mood. Student's first hospitalization occurred after she tried to set a bed on fire at or about the age of 9. Her behavior problems at school and at home also began at or about the age of 9. Student's psychiatric hospitalizations have ranged from 7 to 42 days in duration. Student's psychiatric history is significant for including a reference to or statement of bipolar disorder, but no formal diagnosis of bipolar disorder has ever been rendered for Student.[7]

6. Student is not medication compliant now and has not been consistently medication complaint for the past two years.[8]

7. On April 2, 2012, Student received the Woodcock-Johnson III Tests of Achievement ("WJ-III") at the The tests revealed that when compared to others at her age level, Student's academic achievement is Average in broad written language, written expression, broad math, and math calculation skills, and Low Average in broad reading.[9]

8. Student's most recent psychological evaluation was administered by in March to April of 2012. The examiner was unable to obtain a complete assessment of Student's cognitive and emotional functioning because Student became irritable and frustrated with testing on the first day, she was unable to test on the second day due to the sedating effects of medication, and she refused to test on the third day because she was feeling tired and irritable and adjusting to her new medication.

   Student's performance on the cognitive assessment resulted in Average scores on the Verbal Comprehension, Perceptual Reasoning, and Working Memory Indexes, a Low Average score on the Processing Speed Index, and a Full Scale IQ score of 97, which is in the Average range. However, the test results must be interpreted with caution in light

[5] Petitioner's Exhibit 43; *see also*, Petitioner's Exhibit 41.
[6] Petitioner's Exhibit 35.
[7] Testimony of psychologist; testimony of Parent.
[8] Testimony of psychologist; *see* Petitioner's Exhibit 55, p.2.
[9] Petitioner's Exhibit 30.

of Student's vacillating affect and disposition towards testing. Similarly, although the evaluator determined that Student met the criteria for a primary diagnosis of Mood Disorder NOS, the evaluator was unable to collect enough data and history to confirm or deny a specific mood disorder; the evaluator noted Student's diagnosis of Attention-Deficit/Hyperactivity Disorder ("ADHD") by history but was unable to assess for ADHD; and the evaluator noted Student's historical diagnoses of alcohol abuse and cannabis abuse but was unable to confirm or deny the diagnoses.[10]

9. On April 16, 2012, prepared a Psychiatric Evaluation Report for Student that summarized information gathered from existing reports and documentation concerning Student. The report notes, *inter alia*, that Student currently has multiple criminal charges pending against her for assault- and threat-related conduct, she has had approximately five psychiatric hospitalizations since 2009, that she has been removed from her home on several occasions following physical altercations with Parent, she has a history of school suspensions due to "acting out" behaviors, she has exhibited behavioral problems since approximately age 9, and she self-reported having had intermittent suicidal ideations for years.[11]

10. During SY 2010/11 between August 23, 2010 and March 23, 2011, Student attended a DCPS school and she was cited for 22 disciplinary infractions ranging from the use of profanity or obscene/offensive gestures to disruptive or off-task behaviors to refusing to comply with staff instructions/school rules to leaving the classroom without permission. The consequences imposed for these infractions included off-site short-term suspensions, in-school disciplinary actions, parental contact, verbal redirection, and teacher/parent conferences. Moreover, on April 11, 2011, Student was cited for engaging in Tier 3 behavior that resulted in a recommendation for an off-site suspension from April 12, 2011 to May 4, 2011.[12]

11. On February 16, 2011, a psychiatric consultant at the non-DCPS children's center where Student receives outpatient treatment noted that Student had significant disruptive mood and child-parent problems which could not be addressed on an outpatient basis and opined that a residential placement setting was indicated for Student for further stabilization of her emotional, social and behavior problems. Although the letter also states that Student required the residential placement setting for educational purposes, there were a number of other intermediate steps that could have been taken to address educational progress.[13]

12. At the end of SY 2010/11, the DCPS school Student was attending advised Parent that if Parent did not withdraw Student from the school, Student would be expelled and she would not be allowed to come back the next school year. As a result, Parent withdrew

[10] Petitioner's Exhibit 29.
[11] Petitioner's Exhibit 31.
[12] Petitioner's Exhibits 36 and 40.
[13] Petitioner's Exhibit 5; testimony of psychologist.

Student from the DCPS school and enrolled her in the DCPS Charter School for the start of SY 2011/12.[14]

13. During SY 2011/12 between September 21, 2011 and March 23, 2012, while Student was attending the Charter School, Student was cited for 55 disciplinary infractions that included being late for class, cutting class/leaving class without permission, not showing up for detention, being rude/disrespectful in class, using profanity, failure to wear a school uniform, and harassment, including sexual harassment, and bullying.[15]

14. On March 23, 2012, Student was cited for making sexually harassing comments towards a staff member. As a consequence, the Charter School required Student to remain home from March 23, 2012 to "TBD," which means "to be determined," and Student was recommended for expulsion.[16]

15. Student was hospitalized in on March 27, 2012, shortly after her indefinite suspension, and she was not released until May 9, 2012. Student's treatment plan at the hospital involved identifying her triggers, managing her anger and emotions, and problem-solving. Information about manifestation determination review scheduling or lack of same.[17]

16. The Charter School determined to wait until Student was released from the hospital before conducting an MDR and Parent agreed. Parent notified the Charter School SEC once Student had been released. The MDR was initially scheduled for June 30, 2012, and Parent went to the school on that day, but the SEC advised the Parent that the MDR would have to be rescheduled because the DCPS representatives were not available. Then the parties agreed to July 23, 2012 for the MDR, but the SEC later cancelled due to a family emergency. There was also one occasion when Parent was unable to attend the scheduled MDR. Ultimately, the parties agreed to August 10, 2012, and the MDR was held on that date.[18]

17. Student was not provided with an alternative school location while she was waiting for the MDR to be held, nor was Parent ever informed prior to the MDR that Student could return to school, so Student was not in school at all once she was released from the hospital in May 2012.[19]

18. At Student's August 10, 2012 MDT meeting, the team determined that Student's behavior was a manifestation of her suspected disabilities and a direct result of the school's failure to implement the IEP. However, DCPS was of the opinion that while Student's behavior was a manifestation of her disability, the Charter School implemented the IEP but Student has a history of emotional issues and hospitalization that would

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[14] Testimony of Parent.
[15] Petitioner's Exhibit 47.
[16] Petitioner's Exhibits 50 and 51.
[17] Testimony of social worker.
[18] *See* Petitioner's Exhibits 8-15; testimony of Parent; testimony of SEC.
[19] Testimony of Parent.

impact her ability to perform in school. DCPS further opined that existing documentation suggests that Student has a suspected disability that has not been addressed by direct services from the school. The DCPS representative was also of the opinion that the Charter School was not the correct school for Student, but when Parent asked for another school the DCPS representative said he would have to look further into other schools. Ultimately, the team agreed to meet again to review Student's educational, psychological and psychiatric evaluations that were administered by PIW and make a determination of the proper disability. The Notes also indicate that, *inter alia*, Student was to be returned to school immediately, her record was to be cleared of the suspension, an FBA was to be conducted, and a BIP was to be implemented.[20]

19. DCPS has not offered Parent any options for another school for Student since the MDR was held. There were some attempts to schedule another meeting for Student, but the meeting never went forward. On one occasion, the DCPS representative indicated that he was not available on the date chosen. Thereafter, DCPS attempted to conduct an MDT meeting for Student on August 31, 2012, but Parent's counsel declined the invitation. The meeting was for 9 am, which would have interfered with Parent's work schedule. Parent would have attended the meeting had she known DCPS was willing to schedule it for a later time that same day, but Petitioner's counsel did not inform Parent of DCPS's flexibility. Thereafter, the hearing date was rapidly approaching and no meeting was held. In any event, by the time of the due process hearing in this case on September 4 and 5, Parent was no longer willing to meet with DCPS and consider a DCPS school.[21]

20. Student has technically been eligible to return to the DCPS Charter School since at least August 10, 2012, when the MDR was held, but there is no evidence that DCPS ever sent Parent a reentry letter saying when Student could return to school. Parent made the decision not to send Student back to the school at the start of SY 2012/13 on August 27, 2012. However, once it was made clear to Parent at the first day of the due process hearing in this case that Student was eligible to return to school, Parent sent Student back to the DCPS Charter School on September 5, 2012, the second day of the hearing.[22]

21. Student's final report card for SY 2011/12 reveals that she received Fs in Science, History, English and Reading Development, and Cs in pre-Algebra and Mathematics Lab. The report card further indicates that Student was once again retained in the 8th grade. As a result, Student is repeating 8th grade for the third time during SY 2012/13. This lack of academic progress is not consistent with Student's cognitive abilities, because cognitively there is no reason why she should not be progressing.[23]

22. In terms of educational programming, Student needs a BIP to address her acting out behaviors, and she needs therapeutic services to help her with medication compliance and stabilization of mood.[24] The least restrictive environment for Student is a school that

[20] Petitioner's Exhibit 55; testimony of Parent; testimony of SEC.
[21] Testimony of Parent; testimony of SEC; *see* Petitioner's Exhibits 15-19 and 21; Respondent's Exhibit 5.
[22] Testimony of Parent; testimony of SEC.
[23] Petitioner's Exhibit 53; testimony of psychologist.
[24] Testimony of psychologist.

offers therapeutic services and supports throughout the entire school day, or in other words, a full time therapeutic setting.

23. By letter dated August 24, 2012, Student was accepted into the day school program at a private school located outside of the District. The school's tuition is per day, and it is a 12-month school with 230 academic days per year. The school offers a therapeutic day school program. Males and females attend classes in separate wings of the school, special education services are provided in both self-contained and inclusion classrooms, and there is a 6 to 1 student/teacher ratio in all general education classes. The special education students take electives, such as PE, music and lunch, with non-disabled peers.

    The school services children with a history of acting out problems and provides services to help those students during the day when they get stressed out at school. As a first step in response to acting out behavior the teacher tries to redirect and engage the student, the next step is for behavioral support staff to come in and give the child a break and time to deescalate, and if those steps don't work the therapist will be called in to deal with the situation. The school also provides counseling services either weekly or twice per week in scheduled sessions, as well as crisis counseling as needed throughout the day, family counseling one to two times per month, and after-school groups for anger management, substance abuse, and other problems that are available as appropriate. The school also offers a reward based program with incentives for the students.[25]

24. The testimony presented at trial was insufficient to permit the hearing officer to find definitively, as a fact, that the therapeutic day school program which has accepted Student for admission can implement Student's current IEP because the relevant witness had no personal knowledge of whether the program can implement Student's IEP and could not give any details regarding the classes offered at the program and how they match up with Student's needs as reflected in her current IEP.[26]

25. Student was also accepted for admission into another private school that is located outside of the District but closer in than the therapeutic day school program. However, this school is not right for Student because autistic, intellectually deficient and other students with similar disabilities would be included in Student's classes.[27]

26. Although the Complaint includes a request for an award of compensatory education in the form of academic tutoring and social skills therapy, Petitioner failed to present any documentary or testimonial evidence in support of the request.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact, the arguments of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows:

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[25] Petitioner's Exhibits 59 and 60; testimony of assistant director of admissions; testimony of therapist.
[26] *See* testimony of assistant director of admissions.
[27] Testimony of Parent.

1. **Appropriateness of IEPs for SY 2010/11 and SY 2011/12**

Under IDEA, an IEP is a written statement for each child with a disability that must include, *inter alia*, a statement of the child's present levels of academic achievement and functional performance, including how the child's disability affects the child's involvement and progress in the general educational curriculum; a statement of measurable annual goals designed to meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum and to meet each of the child's other educational needs resulting from the disability; and a statement of the special education and related services and supplementary aids and services to be provided to the child, and a statement of the program modifications or personnel supports that will provided to enable the child to advance appropriately, to be involved in and make progress within the general education curriculum and participate in nonacademic activities, and to be educated and participate with other disabled and nondisabled children. 34 C.F.R. § 300.320(a). Moreover, in developing a child's IEP, the IEP team must, in the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior. 34 C.F.R. § 300.324(a)(2)(i).

The requirement to provide a FAPE is satisfied by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. *Hendrick Hudson Central School District, Westchester County, et. al. v. Rowley*, 458 U.S. 176 (1982). Hence, a disabled child's IEP should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade. *Id.* In determining whether an IEP is reasonably calculated to provide educational benefit, the measure and adequacy of the IEP is to be determined "as of the time it is offered to the student." *Thompson R2-J Sch. Dist. v. Luke P.*, 540 F.3d 1143, 1149 (10th Cir. 2008), *cert. denied*, 555 U.S. 1173 (2009).

In the instant case, Petitioner argues that Student's current and previous IEPs do not contain appropriate information in the PLOP section for social/emotional/behavioral development, which inappropriately relies upon services outside the school setting, that the goals in that section are wildly inappropriate for Student, and that the IEPs are inappropriate for failure to include any behavioral support services for Student despite her continued failures. Petitioner maintains that Student's problems in school center around behavior issues, not learning or intellectual issues, but DCPS did not provide Student with any behavioral support services during the last two school years. Petitioner's asserts that although Student does not need a full-time IEP and the 15 hours of specialized instruction on her current IEP are sufficient, Student needs a full-time therapeutic setting to address her behavior problems.

On the other hand, DCPS notes that the appropriateness of the IEPs is to be determined, not in hindsight, but based on the facts that were available to the IEP team at the time the IEPs were developed, which according to DCPS, demonstrate that the IEPs in the instant case were appropriate when developed. DCPS disputes that there has been evidence that the IEPs, including the PLOPs and goals, are inappropriate, and asserts that Parent agreed with every deliberation made in 2010. Finally, DCPS points out that the IEPs need only provide educational benefit, not maximization.

The evidence in this case reveals that Student has an extensive history of behavior problems and psychiatric hospitalizations that began when she was 9 years old. Indeed, during SY 2010/11 and SY 2011/12, when the IEPs at issue were in effect, Student was cited for a combined total of 77 disciplinary infractions. Hence, even though Student's cognitive and academic skills are generally in the Average range, her behavior impeded her academic progress so much during SY 2010/11 and SY 2011/12 that she was retained in the 8th grade at the end of each school year and is presently repeating 8th grade for the third time.

Despite the extremely negative impact Student's behavioral issues had on her ability to make academic progress during SY 2010/11 and SY 2011/12, her December 2010 and December 2011 IEPs did not require DCPS to provide her with a full-time therapeutic setting that could address her behavioral needs, which is her LRE. *See* Finding of Fact ("FOF") 22, *supra*. In fact, the IEPs did not require Student to receive any behavioral support services at all. DCPS attempts to justify the lack of behavioral support services in the IEPs by pointing out that Student was receiving therapy services outside of the school setting and she refused to participate in behavioral support services in school. However, it is clear from the evidence that the therapy services Student was receiving outside of school were insufficient to provide her with the behavioral support she needed to succeed academically in the school environment. As a result, instead of relying upon Student's refusal to participate in the services as a justification for not providing them, Student's refusal to participate should have been addressed as one of the goals of the behavioral support services that should have been included on the IEP. *See Letter to Borucki*, 16 IDELR 884 (OSEP April 11, 1990) (disabled student's failure to cooperate with school staff and/or educational program does not relieve school district of its obligations under IDEA and may indicate a need for a reevaluation, revision to the IEP, or change in the Student's placement); *Independent School Dist. No. 284, Wayzata Area Schools, Wayzata, Minnesota, v. A.C.*, Civil Action No. 00-2346MN (8th Cir. August 3, 2001) (if disabled child's behavioral problems prevent the child from receiving educational benefit, then the behavioral problems should be addressed in the child's overall program of special education).

Under the circumstances outlined herein, the hearing officer concludes that Student's December 7, 2010 and December 7, 2011 IEPs were inappropriate for failure to include behavioral support services for Student and for failing to provide Student with a full-time therapeutic placement to address her behavior problems, which is her LRE. Accordingly, the hearing officer concludes that Petitioner met its burden of demonstrating that DCPS failed to provide Student with IEPs that were reasonably calculated to provide educational benefit for SY 2010/11 and SY 2011/12.

The hearing officer further concludes that the two IEPs were inappropriate on their face for failure to include proper and relevant information concerning Student's present level of educational performance and needs in the emotional, social and behavioral development section of each IEP. *See* FOFs 2 and 4, *supra*. Accordingly, the hearing officer will Order DCPS to correct this procedural deficiency in the IEPs using the data from Student's current psychological and psychiatric evaluations. However, the hearing officer rejects Petitioner's contention that the behavioral support goals in this section of the IEP are inappropriate, especially since one of the goals coincides with an objective of Student's treatment plan when she was hospitalized in May of 2012.

2. Appropriateness of Placement for SY 2011/12 and Alleged Failure to Provide Any Placement Since May 9, 2012

Under IDEIA, a public agency must provide an appropriate educational placement/location of services for each child with a disability, so that the child's needs for special education and related services can be met. *See* 34 C.F.R. § 300.17; 34 C.F.R. §§ 300.114-300.120. In this regard, a FAPE consists of special education and related services that, *inter alia*, include an appropriate secondary school. *See* 34 C.F.R. § 300.17.

In the instant case, Petitioner argues that the current school placement is inappropriate, which is reflected in Student's lack of progress, and that even DCPS has admitted that the Charter School is inappropriate. Petitioner further argues that DCPS failed to provide Student with any placement at all since May 9, 2012, when she was released from her most recent psychiatric hospitalization. DCPS disagrees with Petitioner's contentions, pointing out that Parent chose the current Charter School for Student.

The evidence in this case reveals that Student's LRE is a full-time therapeutic environment that can address her behavioral needs so that she can make academic progress. The current Charter School clearly has not been able to provide Student with the level of behavioral support services she requires, because the evidence further reveals that Student was cited for a total of 55 disciplinary infractions between September and March of SY 2011/12, and on March 23, 2011 Student was subjected to an indefinite suspension that was not terminated until her August 10, 2012 MDR, which was well after the conclusion of SY 2011/12. The evidence shows that DCPS did not provide Student with an alternative school location during the indefinite suspension, nor did DCPS ever advise Parent that Student could return to the Charter School between her May 9, 2012 release from the psychiatric hospital and her August 10, 2012 MDR. As a result, Student did not attend any school at all from May 9, 2012 through the end of SY 2011/12. Moreover, as noted above, the evidence demonstrates that Student's cognitive and academic skills are generally in the Average range, but her behavior impeded her academic progress so much during SY 2011/12 that she was retained in the 8th grade for the second time at the end of the school year. Finally, as Petitioner notes, DCPS's LEA Representative determined at Student's August 10, 2012 MDR that the Charter School is not the appropriate school placement for Student. Under these circumstances, the hearing officer concludes that Petitioner met its burden of demonstrating that DCPS failed to provide Student with an appropriate school placement for SY 2011/12 and with any school placement at all from May 9, 2012 through the end of the school year. As Student was not entitled to receive ESY services during Summer 2012, the hearing officer deems it unnecessary to determine whether Student was provided with a school placement from the end of SY 2011/12 through the time of her MDR on August 10, 2012.

3. Alleged Failure to Provide IDEA's Disciplinary Protections for Disabled Students

IDEA provides that after a child with a disability has been removed from his or her current placement for 10 school days in the same school year, during any subsequent days of removal the public agency must continue to provide educational services to the student. *See* 34 C.F.R. § 300.530(b)(2) and (d)(1)(i). The child must also receive, as appropriate, an FBA, and behavioral intervention services and modifications, that are designed to address the behavior violation so

that it does not recur. 34 C.F.R. § 300.530(d)(1)(ii). These services may be provided in an interim alternative educational setting. 34 C.F.R. § 300.530(d)(2).

Moreover, within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the LEA, the parent, and relevant members of the child's IEP team must review all relevant information in the student's file and determine if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability, or if the conduct in question was the direct result of the LEA's failure to implement the IEP. 34 C.F.R. § 300.530(e)(1)(i)-(ii). If either of these conditions is met, then the conduct must be determined to be a manifestation of the child's disability. 34 C.F.R. § 300.530(e)(2). If it is determined that the conduct in question was the direct result of the LEA's failure to implement the IEP, the LEA must take immediate steps to remedy those deficiencies. 34 C.F.R. § 300.530(e)(3). In addition, if it is determined that the behavior was a manifestation of the child's disability, the IEP team must either (i) conduct an FBA, unless one has already been conducted, and implement a BIP, or (ii) if a BIP has already been developed, review the BIP and modify it as necessary to address the behavior; and return the child to his or her educational placement unless the parent and LEA agree to a change of placement as part of the modification of the BIP. 34 C.F.R. § 300.530(f). For purposes of these provisions, a change of placement occurs if a removal for disciplinary reasons is for more than 10 consecutive days or the child has been subjected to a series of removals that constitute a pattern. 34 C.F.R. § 300.536(a).

In the instant case, Petitioner argues that DCPS failed to follow proper disciplinary procedures when Student was suspended indefinitely on March 23, 2012 with a recommendation of expulsion, because DCPS failed to provide Student with a timely MDR, an alternative school placement, an FBA and/or a BIP. Petitioner emphasizes that no MDR was held until August, which is well beyond the 10 days required by law, and even if there were scheduling issues after June 30th it was still months after the suspension before the MDR was held. Petitioner further argues that because DCPS suspended Student indefinitely, under 34 C.F.R. § 300.530(b)(2) and (d), DCPS was required to provide Student with services for all periods exceeding 10 cumulative days of suspension during the school year.

DCPS argues that before an MDR could be held for Student, she was placed in a psychiatric hospital, and then there were scheduling problems on both sides once Student was released from the hospital. Hence, DCPS maintains that the time when Student was in the hospital, as well as the period when Parent was unavailable, cannot be counted against DCPS.

The evidence is clear in this case that DCPS failed to conduct an MDR for Student within 10 days of its March 23, 2012 decision to suspend Student indefinitely with a recommendation of expulsion. The hearing officer also notes that there is no requirement that the LEA include in the MDR the disabled student who has been subjected to the change of placement. *See* 34 C.F.R. § 300.530(e)(1). As a result, Student's psychiatric hospitalization within days of her indefinite suspension is irrelevant to DCPS's undisputed failure to conduct the MDR within 10 days of its decision to impose the indefinite suspension. However, even if the period of Student's hospitalization is subtracted from the equation, DCPS did not conduct the MDR until August 10, 2012, which was a full three months after Student's May 9, 2012 discharge from the hospital.

Indeed, DCPS did not even attempt to hold the MDR until June 30th, which was more than 10 days after Student's discharge from the hospital, and then that scheduled MDR as well as another scheduled MDR for July 23, 2010 were cancelled by DCPS.

The evidence also proves Petitioner's assertion that DCPS failed to provide Student with the additional disciplinary protections IDEA provides for disabled children. Hence, DCPS made no provision for Student to continue receiving educational services during the period of her indefinite suspension as required by 34 C.F.R. § 300.530(b)(2) and (d)(1)(i), and DCPS did not ensure that Student received an FBA and behavioral intervention services to address the behavior violation so that it did not recur as required by 34 C.F.R. § 300.530(d)(1)(ii). In addition, once it was determined at Student's August 10, 2012 MDR that Student's behavior was a manifestation of her disability and a direct result of the school's failure to implement the IEP, DCPS did not take immediate steps to remedy the deficiencies that led to the failure to implement the IEP as required by 34 C.F.R. § 300.530(e)(3), nor did DCPS conduct an FBA and implement a BIP as required by 34 C.F.R. § 300.530(f)(1)(i).

Under the circumstances outlined herein, the hearing officer concludes that Petitioner has met its burden of proving that DCPS failed to provide Student with IDEA's disciplinary protections for disabled students. The hearing officer further concludes that as a result of DCPS's violation of IDEA in this regard, Student did not receive any educational services during the period of her indefinite suspension and she did not receive the FBA and the BIP that are needed to analyze and address Student's behavioral issues.

4. <u>Relief To Be Awarded</u>

"Where a public school system has defaulted on its obligations under the IDEA, a private school placement is proper under the Act if the education by said school is 'reasonably calculated to enable the child to receive educational benefits.'" *N.G. v. District of Columbia*, 556 F.Supp.2d 11, 37 (D.D.C. 2008) (quoting *Wirta v. District of Columbia,* 859 F. Supp. 1, 5 (D.D.C. 1994) (quoting *Board of Education of the Hendrick Hudson Central School District, Westchester County v. Rowley*, 456 U.S. 176, 207)). "Courts have identified a set of considerations relevant to determining whether a particular placement is appropriate for a particular student, including the nature and severity of the student's disability, the student's specialized educational needs, the link between those needs and the services offered by the school, the placement's cost, and the extent to which the placement represents the least restrictive environment." *Id.*, 556 F.Supp.2d at 37 (quoting *Branham v. District of Columbia*, 427 F.3d 7, 12 (D.C. Cir. 2005) (citing *Board of Education v. Rowley*, *supra*, 456 U.S. 176, 202)).

In the instant case, Petitioner is requesting a DCPS-funded placement at a full-time private day school located outside of the District, which Petitioner contends is the LRE for Student because Student would be provided with the nonstop therapeutic support she needs and still be allowed to participate in PE and other electives with her nondisabled peers. Petitioner is also requesting the private placement and 50 hours of therapeutic mentoring as compensatory education.

A review of the evidence in this case reveals that although Student's LRE is a full time therapeutic setting and the private day school Petitioner is requesting offers a full-time

therapeutic setting, Petitioner has failed to prove that the private day school can implement Student's current IEP with respect to the 15 hours of specialized instruction required by the IEP. Hence, Petitioner has failed to provide sufficient evidence for the hearing officer to analyze the link between Student's needs and the services offered by the private day school program, with the result that it would be inappropriate for the hearing officer to award Petitioner the requested private placement.

Moreover, although Petitioner has also requested 50 hours of therapeutic mentoring as compensatory education, Petitioner failed to present any documentary or testimonial evidence in support of this request. Indeed, Petitioner failed to present any evidence at all concerning compensatory education. As a result, the hearing officer cannot conduct the fact-specific inquiry necessary to determine what would be an appropriate award of compensatory education for Student. *See Reid v. District of Columbia*, 401 F.3d 516 (D.C. 2005) (hearing officers may award educational services to be provided prospectively to compensate for a past deficient program, but in every case the inquiry must be fact-specific).

Under these circumstances, the hearing officer declines to award the relief requested by Petitioner and will instead order DCPS to conduct an FBA and develop a BIP for Student, to convene a meeting to review and adopt the BIP, review and revise Student's IEP, and designate a school that provides a full-time therapeutic setting where Student's behavioral issues can be addressed.

ORDER

Based upon the above Findings of Fact and Conclusions of Law, it is hereby ordered:

1. Within 10 calendar days of the issuance of this Order, DCPS shall conduct an FBA for Student.

2. Within 17 calendar days of the issuance of this Order, DCPS shall develop a BIP for Student based upon the FBA that has been ordered in Paragraph 1 above.

3. Within 25 calendar days of the issuance of this Order, DCPS shall convene an IEP meeting for Student to revise Student's present level of educational performance and needs in the emotional, social and behavioral development section of the current IEP using the data from Student's current psychological and psychiatric evaluations; revise Student's IEP to provide the level of behavioral support services the team determines to be appropriate; revise the IEP so that it requires Student to be placed in a full-time therapeutic environment; discuss, determine and award appropriate compensatory education to compensate Student for all of the violations of IDEA DCPS committed in this case, as set forth in the Decision accompanying this Order; and discuss, determine and designate an appropriate school that provides a full-time therapeutic setting where Student's behavioral issues can be addressed.

4. DCPS shall ensure that Student begins attending the school designated at the IEP meeting ordered herein, with transportation if necessary, within 30 calendar days of the issuance of this Order.

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety (90) days from the date of the Hearing Officer Determination in accordance with 20 U.S.C. § 1415(i).

Date: 9/19/2012

/s/ Kimm Massey
Kimm Massey, Esq.
Hearing Officer